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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-83

IRMA V. FINCKH, by her Guardian ad litem, BETTY K. JACKSON,

Petitioners,

vs.

ROY HERCHEL FINCKH, Bankrupt and CLIFFORD BENSON, Trustee for the Estate of Roy Herchel Finckh,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Irma V. Finckh, by her guardian ad litem, Betty K. Jackson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 18, 1979.

OPINION BELOW

The Memorandum Opinion of the Ninth Circuit Court of Appeals appears in the Appendix hereto.

JURISDICTION

This court's jurisdiction is invoked under 28 USC §1257(3) and §1(10), 11 USC §1(10).

QUESTIONS PRESENTED

1.

Whether a federal bankruptcy court can disregard a state statute which permits the release of community property interests to the other spouse as her separate property.

2.

Whether a federal bankruptcy court can summarily deprive an individual of her claimed separate property ownership without a hearing and an opportunity to be heard.

3.

Whether an individual has the burden of proving that property in her own name is not an asset in a bankruptcy when that person is not a party to the petition.

4.

Whether the statute of limitations barring suits against a trustee in bankruptcy after two years or the doctrine of laches can defeat the due process clause.

STATUTES INVOLVED

The Revised Code of Washington, RCW 26.16.050 provides that one spouse may release his or her community or separate interest in the other's separate property during the marriage.

The Fifth Amendment to the United States Constitution declares that no person shall be deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

Appellant has been trying to recover her separate property unlawfully and summarily taken from her by a federal bankruptcy court, for twenty-five years. In this case, time is not a healer of all ills.

In May of 1953, Irma Finckh, while married, entered into a real estate contract in Seattle for the purchase of a four-plex apartment building. She executed the agreement as her sole and separate estate and can trace all monies on the contract to her separate estate. To further confirm the character of the property, her husband, Roy Finckh, signed and recorded a deed releasing any possible community or separate interest he may have had in the property.

The deed and release of the husband's interest was given pursuant to a Washington statute: RCW 26.16.050, which provid-

es:

> "a husband may....convey directly to his wife....his community ....interest or estate in all or any portion of their community real property....every deed made from husband to wife..... shall vest the same in the grantee as separate property....."

More than nine months after the deed was recorded Roy Finckh filed an individual and community petition for federal bankruptcy in Seattle. He listed his wife's interest in the apartment house as an asset in the estate. Appellant did not join in the petition and was not represented by counsel throughout the bankruptcy proceedings.

An attorney and trustee were appointed by the bankruptcy judge. On August 10, 1954, the trustee issued a show cause order to appellant's real estate contract seller, Moore. The sole purpose of the hearing was to determine whether Moore should be restrained by the bankruptcy

court from proceeding with a real estate contract forfeiture action which had been started. S.F. 10. Appellant was served with a subpoena in connection with this show cause hearing, but testified only with regard to the restraining order problem. She had no one representing her interests. No hearing was ever held by the bankruptcy court to determine whether it had any jurisdiction or right to appellant's separate property.

On August 24, 1954, the bankruptcy judge found the real estate contract to be the property of appellant and her husbank and restrained Moore from forfeiting the contract.

The trustee thereafter sold the property to third parties. Roy Finckh was discharged from bankruptcy on February 12, 1955. Irma Finckh later annulled the marriage and was adjudged mentally incompetent on February 12, 1962. She remains

so to this very day. Nevertheless, Irma Finckh continued to try, without success, to recover her property for the next 20 years in a series of state court actions. On October 10, 1974, appellant, through her guardian, was granted permission by the bankruptcy court to reopen the estate to permit her to file a petition for reclamation of her separate property. On April 14, 1975, the court granted the trustee's motion to dismiss the petition as a matter of law. The United States District Court denied an appeal on October 10, 1975. This action was affirmed by the Ninth Circuit Court of Appeals by a memorandum opinion filed May 18, 1979, in which that court concluded that Irma Finckh did not claim her property throughout the bankruptcy proceeding or challenge the action of the judge.

REASONS FOR GRANTING THE WRIT

This appeal presents a substantial and important due process question. Thompson v. City of Louisville, 362 US 199.

No written record exists of a hearing before the federal bankruptcy judge concerning the deprivation of appellant's separate property. At best, the only "evidence" presented in the appeal below was by the trustee, a self-serving 20-year old affidavit, to the effect that appellant and her husband testified at the Moore show cause hearing that the property of appellant was never intended to be separate and that it was always intended to be community property. This affidavit was filed twenty years after the show cause hearing to support a motion of the trustee for dismissal of appellant's petition for a hearing regarding reclamation of her property. It cannot now be

rebutted by appeallant because she is and has been incompetent for many years. It can, however, be challenged by Moore. It is upon this affidavit that the Court of Appeals found that appellant had notice and an opportunity to reclaim her property. (Proposed Addition to Summary of Evidence by Respondent, R.37 and Affidavit of Alex Wiley, R. 86).

Our constitution exhibits a special concern over the rights of individuals. This court enunciated those precepts and rights in Hurtado v. California, 110 US 516 (1884) and Adamson v. Californis, 332 US 46 (1947). This court said that due process is to protect "those fundamental principles of liberty and justice which lie at the base of all civil and political institutions: and to guarantee those procedures which are required for the protection of ultimate decency in a civilized society."

Appellant was deprived of her separate property without an opportunity to a hearing. The passage of time cannot breathe the life of legality into what otherwise was an illegal act.

The Bankruptcy Act vests the bankruptcy court with jurisdiction over the bankrupt's property and the determination of controversies relating to the estate. Bankruptcy Act §2(a)7, 11 USC §11(a)(7). However, the power to adjudicate those property rights does not supersede the right of the property owner in possession to object to the exercise of such jurisdiction, and to claim the protection of "due process" of law. Bradley v. St. Louis Terminal Warehouse Co., (CA 8 Ark) 189 F2d 818; Shor v. McGregor, (CA 5) 108 F2d 421. Notice and hearing are basic conditions of due process. Lockman v. Lang, (CA 8) 132 F 1; Sylvan Beach v. Koch, (CA 8) 140 F2d 852.

Appellant's property interest was lodged in her under the Washington statute as her separate property free from the bankruptcy court's actual or constructive possession. Therefore, no court could deprive her of that property without a full and fair hearing. Board of Trade v. Johnson, 264 US 97; RCW 26.16.050. A show cause proceeding directed solely to restrain the seller from forfeiting the real estate contract does not meet the requirements of due process. Appellant should have had an opportunity to present and adjudicate the taking of her property on the merits. Re Eppstein, (CA 8) 156 F 42; Cert. den. 209 US 545.

The limitation on bringing suit to reclaim property within two years after the estate is closed cannot defeat constitutional due process. 11 USC §29(d). Likewise, the doctrine of laches cannot constitutionally defeat appellant's claim

to a full hearing.

CONCLUSION

While the court does not ordinarily grant certiorari to review evidence and discuss specific facts, the naked seizure and denial of a full hearing to appellant presents a shockingly wrong result which in turn presents a substantial due process question for review.

For these reasons, a writ of certiorari should issue to review the decision of the Court of Appeals to correct this glaring miscarriage of justice.

Respectfully submitted,

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Counsel for Petitioners

David W. Harris
Counsel for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRMA V. FINCKH by her Guardian Ad Litem, BETTY K. JACKSON, Plaintiffs-Appellants, v. ROY HERCHEL FINCKH, Bankrupt, and CLIFFORD BENSON, Trustee for the Estate of Roy H. Finckh, Defendants-Appellees.	NO. 78-2274 MEMORANDUM

Appeal from the United States District Court for the Western District of Washington

BEFORE: WRIGHT and TANG, Circuit Judges, and PALMIERI*, District Judge

Irma Finckh appeals from a district court order affirming the bankruptcy court's dismissal of her action to vacate her husband's 1955 bankruptcy ad-

*Senior District Judge, Southern District of New York

judication. She contends that: (1) the adjudication, insofar as it disposed of a fourplex apartment building claimed to be her separate property, is void because she had no notice or hearing prior to or during the proceedings; (2) her action is not barred by the two-year statute of limitations for suits brought against trustees, 11 USC §29(d); and (3) it is not barred by laches. We affirm.

About the time that Mr. Finckh filed a bankruptcy petition, the prior owner of the fourplex commenced a forfeiture action. The bankruptcy referee issued an order to show cause to enjoin the forfeiture. Mrs. Finckh was subpoenaed to appear at the show cause hearing, and the referee's findings of fact show that she testified to her interest in the property. The referee enjoined the forfeiture concluding that the four-

plex was community property. Throughout the bankruptcy proceedings, Mrs. Finckh did not claim the property or challenge the court's action.

The record, therefore, clearly refutes her first assignment of error. She had actual notice that the fourplex was considered part of her husband's estate and had an opportunity to be heard about her claim to the property. The seizure of rents by the trustee also put her on notice that ownership was claimed by the estate. The bankruptcy adjudication was not void for lack of notice and hearing.

Although there is some question whether the two-year statute of limitations for suits against a bankruptcy trustee, 11 USC §29(d), applies to a motion to reopen, see Thomas v. Lurie, 204 F2d 788, 792 (7th Cir. 1953), we conclude that Mrs. Finckh's action is bar-

red by laches.

The district court did not abuse its wide discretion in dismissing on this ground. Seven years elapsed after the bankruptcy adjudication before Mrs. Finckh was declared incompetent, and a total of 19 years passed before her guardian brought this action. The doctrine of laches is an appropriate basis for decision, particularly when the property has passed into the hands of third parties and the rights of bona fide purchasers could be prejudiced by reopening the adjudication. See Hull v. Powell, 209 F2d 3, 5-6 (9th Cir. 1962).

AFFIRMED.